United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 16-1752**
	)	**Issued: March 1, 2017**
DEPARTMENT OF THE ARMY, FORT LEONARD WOOD, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 30, 2016 appellant filed a timely appeal from a June 17, 2016 merit decision and an August 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a traumatic injury causally related to a February 27, 2015 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits under 5 U.S.C. § 8128(a).

[1] The Board notes that appellant submitted new evidence on appeal. The Board, however, cannot consider this evidence as its review of the case is limited to the evidence of the record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 27, 2015 appellant, then a 51-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that on February 27, 2015 he sprained his left foot and ankle when small arms protective insert (SAPI) plates fell over and landed on his foot. On form reports dated March 5, 2015 Dr. G. Ripoli, an employing establishment osteopath, diagnosed ankle sprain and advised that appellant should not bear weight on the left lower extremity for one week.

On May 11, 2016 appellant filed a recurrence of disability claim (Form CA-2a) indicating that long periods of standing and twisting would cause sharp pain in the left ankle and foot which had recently worsened such that by May 1, 2016 he was using crutches. He stated that the recurrence began on May 2, 2016. The employing establishment indicated that no accommodations were made for appellant after the initial injury.

In support of his claim, appellant submitted a May 2, 2016 disability slip, signed by Dr. Selina A. Jeanise, an employing establishment osteopath, who indicated that appellant should not work for 72 hours and could then return with no weight bearing until he was cleared by his private physician.

By letter dated May 17, 2016, OWCP noted that appellant's initial claim was administratively approved because it appeared to be a minor injury that resulted in minimal or no lost time from work and was not challenged. It informed appellant that the claim had now been reopened for formal adjudication because he had filed a claim for recurrence. OWCP notified appellant that the medical evidence of record did not establish that the diagnosed left ankle sprain was caused or aggravated by an employment injury. Appellant was asked to provide all medical records of treatment relating to the February 27, 2015 employment incident and advised to submit a medical report from an examining physician with an opinion explaining how the reported work incident caused or aggravated the claimed injury. OWCP forwarded an attending physician's report (Form CA-20) for his convenience. The letter also informed appellant that nurse practitioners and physician assistants were not considered qualified physicians under FECA unless the medical report was countersigned by a physician. Appellant was afforded 30 days to respond.

In a May 2, 2016 report, Dr. Jeanise noted a diagnosis of left foot pain, degenerative changes, and possible peroneus longus tendon damage. She recommended splinting, elevation, and ice packs, and provided restrictions of nonweight bearing and crutches until a follow up with his primary physician.

By decision dated June 17, 2016, OWCP denied the claim. It noted that, although informed of the evidence needed to establish his claim, appellant had not submitted records of medical treatment relating to the accepted February 27, 2015 employment incident or a medical report from a physician explaining how the February 27, 2015 employment incident caused the current condition.

Appellant requested reconsideration on July 19, 2016. This was accomplished by a check mark on the form indicating said request. A June 20, 2016 magnetic resonance imaging (MRI) scan of the left foot and ankle demonstrated a torn anterior talofibular ligament, a partial tear

versus sprain of the posterior talofibular ligament, moderate tendinopathy and mild intrasubstance tearing of the peroneus long tendon with mild peroneus brevis and peroneus long tenosynovitis, a small area of signal change that could be sequela of a mild osteochondral injury, and mild degenerative formation of the cuboid calcaneus articulation and base of the fourth metatarsal.

In a July 14, 2016 report, Marie Wright, a family nurse practitioner, advised that appellant reported a history that SAPI plates fell on his left foot on February 27, 2015, and that he had a similar injury on May 2, 2016. She indicated that appellant was evaluated on May 20, 2016, continued under her care, and was unable to bear weight on the left foot due to tears of the peroneus longus tendon and anterior and posterior talofibular ligaments. Ms. Wright concluded that appellant would be further evaluated by orthopedics on July 25, 2016 and recommended evaluation by an occupational medicine physician. On July 19, 2016 she reiterated appellant's restrictions and advised that appellant could not work on July 18, 2016 due to left foot and ankle pain.

In a nonmerit decision dated August 12, 2016, OWCP denied review of the merits of the June 17, 2016 decision. It found that the evidence submitted was insufficient to warrant merit review, noting that the MRI scan did not include an opinion on causal relationship, and that, as Ms. Wright's reports were not countersigned by a physician, her reports were not considered medical opinion evidence under FECA.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,[3] including that he or she is an "employee" within the meaning of FECA and that the claim was within the applicable time limitation.[4] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[6]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[7] The opinion of the physician must be

[3] *J.P.*, 59 ECAB 178 (2007).

[4] *R.C.*, 59 ECAB 427 (2008).

[5] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *T.H.*, 59 ECAB 388 (2008).

[7] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[8] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[9]

ANALYSIS -- ISSUE 1

It is undisputed that, while at work on February 27, 2015, SAPI plates fell over and landed on appellant's left foot. The Board, however, finds that the medical evidence of record is insufficient to establish that this accepted incident resulted in an employment injury.

Medical evidence submitted to support a claim for compensation should reflect a correct history, and the physician should offer a medically-sound explanation of how the claimed work event caused or aggravated the claimed condition.[10] No physician did so in this case.

The medical evidence submitted which is relevant to the claimed injury consists of two reports from Dr. Jeanise, an employing establishment osteopath. On a disability slip dated May 2, 2016 Dr. Jeanise noted that appellant was excused from work for 72 hours and should not bear weight until cleared by his private physician. This was supplemented by a May 2, 2016 treatment note in which she diagnosed left foot pain, degenerative changes, and possible peroneus longus tendon damage. Dr. Jeanise recommended splinting, elevation, and ice packs, and provided restrictions of no weight bearing and crutches until a follow up with his primary physician. She did not, however, relate the diagnosed condition to the February 27, 2015 incident or to any employment event. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11]

Consequently, the medical evidence of record, at the time of the June 17, 2016 OWCP decision, is insufficient to meet appellant's burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on

[8] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[9] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[10] *D.D.*, Docket No. 13-1517 (issued April 14, 2014).

[11] *K.W.*, 59 ECAB 271 (2007).

application by a claimant.[12] Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards enumerated in section 10.606(b)(3).[13] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[14] Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[15]

ANALYSIS -- ISSUE 2

With his July 19, 2016 reconsideration request, appellant merely indicated by a check on an OWCP form that he was requesting reconsideration. He therefore did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b).[16]

As to the third above-noted requirement under section 10.606(b)(3), appellant submitted a June 20, 2016 report of a left foot and ankle MRI scan. This evidence, however, did not contain an opinion regarding a cause of any diagnosed condition. The merit issue in this case is whether appellant established a traumatic injury causally related to the February 27, 2015 employment incident. The Board has long held that evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[17]

Appellant also submitted reports dated July 14 and 19, 2016 from Ms. Wright, a family nurse practitioner. A nurse practitioner is not considered a physician under FECA.[18] Thus, her opinion is of no relevance to the issue of causal relationship and does not comprise a basis for reopening the case for a merit review.[19]

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[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.608(a).

[14] *Id*. at § 10.608(b)(3).

[15] *Id*. at § 10.608(b).

[16] *Id*. at § 10.606(b).

[17] *D'Wayne Avila*, 57 ECAB 642 (2006).

[18] Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. Registered nurses, licensed practical nurses, and physician assistants are not "physicians" as defined under FECA. Their opinions are of no probative value. *Roy L. Humphrey*, 57 ECAB 238 (2005).

[19] *See K.J.*, Docket No. 16-0611 (issued May 13, 2016).

As appellant did not show that OWCP erred in applying a point of law, advancing a relevant legal argument not previously considered, or submitting relevant and pertinent new evidence not previously considered by OWCP, it properly denied his reconsideration request.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a traumatic injury causally related to the February 27, 2015 employment incident, and that OWCP properly denied appellant's request for reconsideration of the merits under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 12 and June 17, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board